

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA TRANSPORTATION REGULATION BOARD

In the Matter of the Petition
of Broadacre Mobile Home Transport,
Inc., 120 Second Street South,
Brookings, South Dakota 57006,
for Contract Carrier Permit
Authority

FINDINGS OF FACT.
CONCLUSIONS AND
RECOMMENDED ORDER

The above-entitled matter came on for hearing before Administrative Law Judge Phyllis A. Reha on January 16, 1991 at the Lyon County Courthouse, 607 West Main Street, Marshall, Minnesota. The record closed upon receipt of the Board's Order with respect to a portion of the petitioned authority on May 6, 1991.

Appearing on behalf of Broadacre Mobile Home Transport, Inc. (Broadacre or Petitioner) was T.F. Martin, Attorney at Law, McCann, Martin and McCann, P.C., 317 6th Avenue, Brookings, South Dakota 57006-0078. Appearing on behalf of Barrett Mobile Home Transport, Inc. (Barrett or Protestant) was Joel D. Johnson, Attorney at Law, Dosland, Nordhougen, Lillehaug, Johnson & Saande, P.A., 730 Center Avenue, Suite 203, Box 100, Moorhead, Minnesota 56561-0100.

Notice is hereby given that, pursuant to Minn. Stat. 14.61, and the Rules of Practice of the Public Utilities Commission, as applicable to the Transportation Regulation Board, and the Rules of the Office of Administrative Hearings, exceptions to this Report, if any, by any party adversely affected must be filed within 20 days of the mailing date hereof with the Transportation Regulation Board, Minnesota Administrative Truck Center, 254 Livestock Exchange Building, 100 Stockyards Road, South St. Paul, Minnesota 55075. Exceptions must be specific and stated and numbered separately. Proposed Findings of Fact, Conclusions and Order should be included, and copies thereof shall be served upon all parties. If desired, a reply to exceptions may be filed and served within ten days after the service of the exceptions to which reply is made. Oral argument before a majority of the Board may be permitted to all parties adversely affected by the Administrative Law Judge's recommendation who request such argument. Such request must accompany the filed exceptions or reply, and an original and five copies of each document must be filed with the Board.

The Minnesota Transportation Regulation Board will make the final determination of the matter after the expiration of the period for filing exceptions as set forth above, or after oral argument, if such is requested and had in the matter.

Further notice is hereby given that the Board may, at its own discretion. accept or reject the Administrative Law Judge's recommendation and that said recommendation has no legal effect unless expressly adopted by the Board as its final order.

STATEMENT OF ISSUE

The issue in this case is whether the Petitioner has established the statutory criteria for a grant of contract carrier permit authority to serve (1) Highland Manufacturing, Box 427, Worthington, Minnesota; (2) Homera, Tracy, Minnesota; and (3) Centennial Homes, Montevideo, Minnesota for the transportation of mobile homes pursuant to Minn. Stat. 221.121, subd. 1 (1990).

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

PROCEDURAL FINDINGS

1. On September 18, 1990, Broadacre Mobile Home Transport, Inc. filed a petition with the Minnesota Department of Transportation for contract carrier permit authority to serve (1) Highland Manufacturing, Box 427, Worthington, MN; (2) Homera, Tracy, MN; (3) Friendship Homes, Montevideo, MN; and (4) Centennial Homes, Montevideo, MN, for the transportation of mobile homes.

2. The Board published notice of the petition in its weekly calendar on September 21, 1990. Interested persons were given until October 11, 1990 to protest the petition.

3. On September 28, 1990 Barrett Mobile Home Transport, Inc. filed a timely protest to the petition. Barrett also filed an amended protest to the petition on October 3, 1990. On October 5, 1990, Wandering Wheels, Inc. filed a timely protest to the petition. Prior to the contested case hearing, Wandering Wheels, Inc. withdrew its protest to the petition.

4. The Board referred the protested petition to the Office of Administrative Hearings for contested case proceeding and a published notice of the hearing in its weekly calendar commencing on December 7, 1990 and weekly thereafter through the date of the hearing.

5. Following the evidentiary hearing but prior to the close of the hearing record, Barrett withdrew its objection to the granting of the contract carrier permit authority requested to serve Friendship Homes of Montevideo, Minnesota. By letter dated April 16, 1991 to the Transportation Regulation Board, the Administrative Law Judge notified the Board that the portion of the pending petition relating to Friendship Homes was uncontested and further recommended that this portion of the petition be handled as an uncontested matter by the Board. If the Board determined to allow the severing of the petition, the Administrative Law Judge would go forward and issue Findings of Fact, Conclusions of Law and Recommendation with respect to the remaining contested portions of the petition. On May 1, 1991, the Board issued its order granting the Petitioner contract carrier permit authority to serve the

account of Friendship Homes, Montevideo, Minnesota for the transportation of mobile homes. The Board further ordered that the balance of the petition to serve the remaining accounts would continue to be processed according to the regular contested case procedures. (In the Matter of the Petition of Broadacre Mobile Home Transport, Inc., 122 Street South, Brookings, South Dakota 57006, for contract carrier permit authority, docket no. CC 53469/A-90-300, May 1, 1991).

Broadacre Mobile Home Transport, Inc.

6. Broadacre Mobile Home Transport, Inc. is a South Dakota Corporation which has conducted a business related to the transportation of new and used mobile homes since 1969.

7. In the fall of 1979, Michael J. McClemans and Kathy A. McClemans purchased the company and carried on the business of transporting new and used mobile homes since that time. The Petitioner's business location is 120 Second Street South, Brookings, South Dakota.

8. The Petitioner holds an Intrastate Commerce Commission (ICC) certificate of public convenience and necessity to operate as a common carrier in interstate commerce over irregular routes transporting mobile homes between points in Minnesota and South Dakota on the one hand, and, on the other, points in Colorado, Iowa, Idaho, Kansas, Minnesota, Montana, North Dakota, Nebraska, New Mexico, Oklahoma, South Dakota, Utah, Wisconsin and Wyoming under ICC Permit No. MC-173751.

9. The Petitioner also holds from the South Dakota Public Utilities Commission a permit to tow or pull mobile homes between all points in the state of South Dakota (Permit No. 9663-B). Except as recently approved by the Board in Finding 5 above, the Petitioner does not currently hold any Minnesota intrastate permit authority of any kind.

10. The Petitioner has seven vehicles which have been registered with the Department. They are all of the vehicles used by the Petitioner under its interstate ICC and South Dakota authorities. There is no testimony or evidence in the record as to whether all of these vehicles will be available for the Minnesota intrastate contract carrier authority for which the Petitioner is requesting. However, all of the Petitioner's trucks are designed to transport mobile homes. They are designed with mirrors, safety features and lights necessary for safe transportation of mobile homes. These vehicles have been inspected from time to time by the United States Department

of Transportation and South Dakota and Minnesota Departments of Transportation. (Hearing Ex. 1).

11. During 1990, the Petitioner held written contracts with Homera Homes of Tracy, Minnesota (Homera) and Highland Manufacturing of Worthington, Minnesota (Highland). Pursuant to those contracts, the Petitioner offered a specialized service to transport those manufacturers' mobile homes providing a specialized toter designed for the transportation of oversized and over height modular mobile homes. The Petitioner also offered a Minnesota licensed mobile home set-up service to the manufacturers. The Petitioner provided service to both Homera and Highland under its interstate ICC authority. However, during the busy summer months of 1990, the Petitioner did haul mobile homes for both Homera and Highland from their Minnesota facilities to various Minnesota

destinations. These movements were Minnesota intrastate transportation services which required Minnesota intrastate permit authority from the Minnesota Transportation Regulation Board. The Petitioner did not hold such Minnesota intrastate authority in the summer of 1990. The Petitioner was aware that it was necessary to have Minnesota intrastate authority to haul private or irregular routes, however it did not believe it needed separate authority to operate on a direct contract basis with these mobile home manufacturers. (Hearing Ex. 1, item 16).

12. On July 27, 1990 and August 2, 1990, the Petitioner received two citations from the Minnesota Department of Transportation Motor Carrier Safety and Compliance Division (Department) for violating Minnesota statutes sections 221.021 and 221.291, subdivision 4 for operating as a motor carrier without a permit in full force and effect. Following the citations, on August 15, 1990, the Department conducted an inspection of the Petitioner's authority and in a Vehicle Inspection Report dated September 19, 1990, itemized seven motor carrier intrastate movements: 2 movements from Tracy to Nisswa on June 12, 1990 to June 16, 1990; 2 movements from Tracy to Nisswa on June 13, 1990 to June 17, 1990; 2 movements from Worthington to Fergus Falls on July 27, 1990 to July 30, 1990; and 1 movement from Worthington to Hastings on August 2, 1990, to August 6, 1990. (Hearing Ex. 2g page 1, 2h page 1, and 2i page 1). Petitioner was advised to cease all intrastate operations immediately. This Report was acknowledged by Petitioner on September 10, 1990. The Petitioner did cease all Minnesota intrastate operation and shortly thereafter filed the instant petition for intrastate contract carrier permit authority.

13. On August 2, 1990, the Petitioner was issued an over dimension permit from the Department for the movement of a mobile home for Highland from Worthington to Hastings between August 2, 1990 through August 6, 1990. (Hearing Ex. 3). On August 14, 1990, the Petitioner was issued an over dimension permit for the movement of a mobile home for Highland from Worthington to Red Wing between August 15, 1990 through August 19, 1990. (Hearing Ex. 4). A third over dimension permit was issued by the Department on August 14, 1990 for the movement of a mobile home for Highland from Worthington to Red Wing between the dates of August 15, 1990 and August 19, 1990. The Petitioner obtained these over dimension permits following the citations dated July 27, 1990 and August 2, 1990 citing the Petitioner for the illegal Minnesota intrastate movements delineated in Finding 12 above but

prior to the receipt by Petitioner on September 10, 1990, of the Department's vehicle inspection report directing the Petitioner to cease operations immediately. (Hearing Ex. 2g page 1).

14. The Petitioner has also been the subject of Minnesota and South Dakota motor carrier inspections. The Petitioner was cited for the following violations:

- 1) In December of 1987 there was a Minnesota DOT inspection citing the Petitioner for not having a fire extinguisher secured to the vehicle and for having a tail light out on a vehicle. (Hearing Ex. 2a page 1).
- 2) In 1989, the Petitioner was cited for speeding 73 miles per hour in a 65 miles per hour zone by the South Dakota Department of Public Safety. (Hearing Ex. b page 1).

3) In 1989, the South Dakota Department of Public Safety issued a warning ticket to the Petitioner for making an oversized trailer movement before sunrise. (Hearing Ex. 2c page 1).

4) In June of 1990, the Minnesota DOT conducted a vehicle inspection and found the following violations: (1) no log book in possession; (2) air leak in rear cab of relay valve; (3) excessive oil leak in the rear end; (4) brakes/ axles oil coated-check linings ; (5) in operative brake lights; (6) an inoperative left turn signal. (Hearing Ex. 2d page1).

15. Subsequent to those violations and inspections, as of July 1 , 1990, all of the Petitioner's trucks have passed new ICC maintenance inspections. In addition, the Petitioner has passed safety inspections in South Dakota. (Hearing Ex . 1 , item 15 and 18).

16. Broadacre's petition for contract carrier permit authority was signed and notarized by the Petitioner and provides the Petitioner's statement of assets and liabilities as of January 15, 1990. The Petitioner has total assets of \$123,150.00. Significantly, of that amount \$10,500.00 is cash, and \$51,500.00 is the value of the trucks, trailers and tractors used in its transportation operation. Its debt applicable to transportation equipment is \$9,100.00. The Petitioner's total net worth is \$114,050.00. The Petitioner has the financial ability to conduct the proposed operation.

17. The Petitioner maintains insurance in full force and effect with Empire Fire and Marine Insurance Company. This insurance is provided for all of the toters owned by the Petitioner used in its mobile home transportation business, (Hearing Ex. 1, item 6, attachment 4).

18. The Petitioner operates the following equipment in its mobile home transportation business: (1) 1984 Mack Toter No. CC1375; (2) 1978 International Toter No. 31135; (3) 1978 International Toter No. 18932; (4) 1978 International Toter No. 18948; (5) 1983 White Toter No. 56361 ; (6) 1977 GMC Toter No. 79081. This equipment is specialized for the transportation of mobile homes. All of the equipment is designed with mirrors, safety features, lights designed for the safe transportation of mobile homes. These vehicles are in excellent running condition and meet ICC and South Dakota Safety Standards. The equipment has also been inspected from time to time by the Department. (Hearing Ex. 1, item 10, 18 and 19).

Highland Manufacturing

19. Highland Manufacturing manufactures mobile homes in Worthington, Minnesota. Its operations manager is Ronald Totten. Mr. Totten has been employed by Highland for 3 1/2 years and is responsible for the day to day operations of Highland. He is also responsible for dispatching shipments of the company's manufactured product.

20. Highland Manufacturing usually opens its manufacturing operations in February of each year and closes down approximately December 15 of each year. It manufactures between 12 and 15 homes per week and 500 homes per year. It

employs 100 individuals. It provides its manufactured mobile homes to approximately 25 to 30 dealers both inside and outside of Minnesota. The average cost of its manufactured mobile home is \$22,000.00. Its homes are usually double wide mobile homes of 14 feet by 28 feet and 16 feet by 80 feet.

21. The dealers that Highland provides mobile homes to generally expect delivery on the new manufactured mobile home within 3 weeks from the date the home is ordered from the factory. Generally, dealers promise mobile home purchasers that the mobile home can be moved into within three weeks from the date of order. "Economic housing on a timely basis" is the key selling point that dealers stress to their customers. Accordingly, a dealer expects a newly ordered mobile home to reach a customer within three weeks from the date of order. The busiest months of the season are May, June, August and September. Most of the mobile homes are ordered and delivered during these four months. Prompt shipping of the mobile home to the customer is also important to Highland because it does not bill for the cost of the home until it leaves the factory for shipment to the customer.

22. Highland's primary mobile home carrier is Wandering Wheels. Highland also uses secondary carriers including Broadacre, Barrett, Ski and Buds Mobile Home of North Dakota. A dealer can also choose to leave the freight charges off of the payment for the mobile home and select its own carrier. Otherwise, Highland chooses the carrier to deliver the mobile home to the customer. Highland's primary carrier Wandering Wheels, maintains two trucks dedicated to servicing Highland's needs. Wandering Wheels is not anticipating adding any more trucks for 1991.

23. Highland is a small growing mobile home manufacturer. Sales for 1990 were significantly better than they were for 1989. The company expects the sales figures for 1991 to be even better.

24. During the busy season of 1990, on approximately ten occasions, Highland could not obtain timely transportation services from its primary carrier Wandering Wheels or its secondary carriers including Barrett. During this period of time, Highland had approximately 20 to 30 manufactured mobile homes waiting in its yard to be shipped. The majority of Highland's business is within the state of Minnesota. Approximately 10 to 15 of these homes were destined for delivery within the state of Minnesota.

25. During this busy season of 1990, Highland not only contacted its

primary carrier and secondary carriers to obtain shipping arrangements, but it also contacted the dealers directly to request that they make their own arrangements for shipments to customers. It was during this busy period of time that Highland contacted the Petitioner to provide Minnesota intrastate shipments of the mobile homes as described in Finding 12 above. During the period August 2 through 6, the Petitioner provided Highland with intrastate shipment of a mobile home from Worthington to Hastings and on August 15, through 19, the Petitioner provided the transportation of a mobile home for Highland from Worthington to Red Wing.

26. The Petitioner has provided interstate transportation of its mobile homes to Highland for at least 3 1/2 years. Highland finds the Petitioner to be competent and reliable and has been completely satisfied with the transportation services provided by Petitioner.

27. Highland estimates that an additional 4 to 5 trucks were needed during the 1990 busy season to accommodate all of the transportation needs of Highland. Highland further estimates that an additional 4 to 5 trucks will be sufficient to service the anticipated 1991 needs of Highland.

Homera Homes and Centennial Homes

28. Homera Homes has entered into a contract for trucking services with the Petitioner for transportation of modular homes on a Minnesota intrastate basis, to and from its place of business in Minnesota. The contract is dated September 5, 1990. Attached to the Petition for contract carrier permit authority is a "statement of specialized service offered" signed by the vice president of Homera Homes. The statement indicates a general need for a carrier that can transport Homera modular homes with a specialized toter that is designed and built only for the transportation of oversized and over-height modular home loads. The Petitioner did not offer any testimony or evidence at the hearing with respect to any specific needs of Homera Homes.

29. Centennial Homes of Montevideo, Minnesota and Aberdeen, South Dakota has entered into a contract for trucking services with the Petitioner for the transportation of mobile homes on a Minnesota intrastate basis to and from its place of business in Minnesota. The contract is dated September 5, 1990. Attached to the petition for contract carrier permit authority, Centennial Homes has provided a "statement of specialized service offered" indicating a general need for Minnesota intrastate transportation of mobile homes with a specialized mobile home toter that is designed and built only for the transportation of oversized mobile home loads when Centennials own service crew is not available. The Petitioner did not offer any other specific testimony or evidence with respect to the needs of Centennial homes which would support the Petitioner's request for contract carrier permit authority to serve Centennial Homes.

Protestant Barrett Mobile Homes

30. Barrett Mobile Home Transport, Inc. is an interstate and intrastate transporter of mobile homes. Its headquarters are at 1825 Main Avenue in Moorhead, Minnesota. It holds irregular route common carrier permit authority from the Board (permit no. 22574) for the transportation of mobile homes via irregular routes between all points and places in the state of Minnesota. (Hearing Ex. 6). Barrett has nation wide interstate irregular route authority and intrastate authority in 47 states primarily serving the Dakotas, Minnesota, Iowa, Nebraska, Wisconsin, the Upper Penninsula of Michigan, East Wyoming and East Montana.

31. Barrett maintains four terminals that service the needs of Minnesota customers. The company maintains two toters in its main terminal in Fargo, North Dakota, one toter in Bemidji, ten toters in Montevideo and one toter in Mankato. (Hearing Ex. 7). Barrett also maintains equipment that could service Minnesota customers in Mount Hope, Wisconsin; Spring Valley,

Wisconsin; Aberdeen, South Dakota; Devils Lake, North Dakota and Grand Forks, North Dakota. All of its tractors are owner/operated and are leased to Barrett to provide transportation under Barrett's authorities. All of the toters utilized by Barrett are suitable for hauling oversized mobile homes and are appropriately equipped with the hitch ball assembly, mirror bars and the proper flashing amber lights.

32. During 1990, Barrett made 35 Minnesota intrastate movements for Highland. Barrett made a total of 70 movements for Highland when Interstate movements are included. Barrett was not able to meet 100% of the needs of its customers during 1990 although it had added 2 to 3 more trucks than it had in 1989. One of the reasons for the shortage of trucks in 1990 is that a carrier by the name of NTC of Tulsa, Oklahoma went bankrupt. In addition, two of Barrett's ten trucks available at the Montevideo terminal were not available in 1990. One was sold and one was in an accident. Both of these toters have now been replaced. Accordingly, for 1991, Barrett will have a minimum of 14 trucks available to serve the needs of Minnesota intrastate customers. With the addition of available toters at other terminals, Barrett expects to have available an additional four to eight toters in the Minnesota market for the busy 1991 season. With the addition of these toters for the 1991 season, Barrett expects to be able to handle 100% of the 1991 needs of the mobile home manufacturers for whom Broadacre is requesting contract carrier permit authority.

33. Barrett provided a transcript of Minnesota shipments between the period January 1, 1990 through December 31, 1990. This transcript of shipment shows the date of shipment to the customer. The date of shipment starts when the mobile home is hooked onto the toter. (Hearing Ex. 9). In addition, Barrett has provided 429 freight bills which show the dates the mobile homes were shipped and the dates they were delivered to the customers. In 289 shipments, two days or less passed between the dates the homes were shipped and the dates the homes arrived at their destinations. Fifty three additional shipments were completed in three or four days. Thus, in 342 of the 429 shipments, the shipments were completed within four days. Generally, mobile home manufacturers such as Highland Manufacturing want mobile home shipments to be completed within 2 days.

34. The freight bills do not precisely indicate the exact date of pick up at the factory or delivery to customers because some shipments may be

delayed due to dealer requests, financing delays, retail drops at distant sites with the dealer having to arrange for set-up crews, shortages of manufactured mobile homes, and weather. Such delays are not attributable to Barrett. There were occasions in 1990 when Barrett was unable to provide timely service to Highland due to lack of trucks. On ten occasions during 1990, Highland Manufacturing was unable to obtain timely delivery of its mobile homes after contacting its primary carrier Wandering Wheels and Barrett. However, Highland Manufacturing believes that an additional four to five trucks available from Barrett would meet its 1991 transportation needs.

35. Generally, mobile home carriers find it impossible to meet a two day delivery standard during the busy season between one week prior to Memorial Day and one week after Labor Day due to state transportation rules which restrict the movement of oversized loads during hours of daylight, until 2:00 p.m. Friday, and until noon on Sunday. Mobile Home transporters are also subject to adverse road or weather conditions and can not make authorized movements if roads are slippery due to ice, snow or rain or if visibility is less than 112 mile. Furthermore, mobile home transporters are not permitted to make movements if winds exceed 25 miles per hour.

36. Barrett employs sales personnel for the region which includes Minnesota. In addition to contact by sales personnel, Barrett advertises in

the yellow page directories in Minnesota and distributes promotional literature to potential customers. (Hearing Ex. 8, pages 1-6). Barrett solicits the business of Highland, Homera and Centennial Homes

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Transportation Regulation Board has jurisdiction of the subject matter of the hearing.

2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter is properly before the Administrative Law Judge.

3. From Petitioner's experience, knowledge of the regulations and financial condition, it is fit and able within the meaning of Minn. Rule 7800.0100, subp. 4.

4. Petitioner's vehicles, being regularly maintained free from defects and meet the ICC safety regulations, are within the safety requirements prescribed by the Department.

5. The Petitioner has established a public need for additional mobile home transport service for the account of Highland Manufacturing of Worthington, Minnesota. It has not established a public need for additional mobile home transport service for either Homera Homes of Tracy, Minnesota or Centennial Homes of Montevideo, Minnesota.

6. The Protestant Barrett Mobile Home Transport, Inc. has demonstrated that it can adequately meet the need demonstrated by the Petitioner for the account of Highland Manufacturing, Inc.

7. As a consequence of Conclusion 6 Broadacre Mobile Home is not entitled to the grant of contract carrier permit authority to transport mobile homes within the state of Minnesota for the account of Highland Manufacturing.

8. Any conclusion more properly considered a Finding of Fact, and any Finding of Fact more properly considered a Conclusion, is hereby expressly adopted as such.

THIS REPORT IS NOT AN ORDER AND NO AUTHORITY IS GRANTED HEREIN. THE TRANSPORTATION REGULATION BOARD WILL ISSUE THE ORDER OF AUTHORITY WHICH MAY ADOPT OR DIFFER FROM THE FOLLOWING RECOMMENDATIONS.

Based on the foregoing Conclusions, it is the recommendation of the Administrative Law Judge to the Board that it issue the following:

ORDER

The petition of Broadacre Mobile Home Transport, Inc. for contract carrier permit authority to serve (1) Highland Manufacturing, Box 427,

Worthington, Minnesota; (2) Homera Homes, Tracy, Minnesota; (3) Centennial Homes, Montevideo, Minnesota for the transportation of mobile homes between points in Minnesota is DENIED.

Dated: may 23 , 1991.

PHYLLIS A. REHA
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped (cassette nos. 9896 and 9895).

MEMORANDUM

Broadacre Mobile Home Transport, Inc. originally filed a petition for contract carrier permit authority to serve four different Minnesota mobile home manufacturers for the transportation of mobile homes. The contract carrier permit authority to serve Friendship Homes, of Montevideo, MN, was not contested and the matter was referred back to the Transportation Regulation Board to be handled as an uncontested matter. On May 1, 1991, the Board granted the Petitioner the contract carrier authority to serve Friendship Homes. The remaining parts of the petition that continue to be contested are for contract carrier permit authority to serve (1) Highland Manufacturing of Worthington, MN; (2) Homera, of Tracy, MN; (3) Centennial Homes, of Montevideo, MN. Barrett Mobile Homes Transport, Inc. is the sole Protestant to the Petitioner's request for authority.

Fit and Ability

Minn. Stat. 221.111 requires contract carriers to obtain permits in accordance with Minn. Stat. 221.121. Accordingly, the petition is governed by Minn. Stat. 221.121, subd. 1. The initial condition to a grant of contract carrier permit authority is a showing that Broadacre is fit and able to conduct the proposed operations and that its vehicles meet the safety standards established by the Minnesota Department of Transportation.

Minn. Rules 7800.0100, subp. 4 provides as follows:

The term "fit and able" shall mean that the applicant is financially able to conduct the proposed business; that the applicant's equipment is adequate and properly maintained; that the applicant is competent, qualified, and has the experience necessary to conduct the proposed business; that the applicant is mentally and physically able to comply

with the rules, regulations and statutes of the
commission.

The Administrative Law Judge has found that Broadacre has the financial resources to conduct the business of mobile home transport (Jurisdictional Exhibit). The financial statement of assets and liabilities filed by the Petitioner with its petition indicates that Broadacre is a financially sound company and has the financial resources to conduct the proposed operation. The Protestant offered no evidence to contest the financial fitness or ability of Broadacre to conduct the proposed operations. In addition, the Petitioner has been in the mobile home transportation business since 1979 and holds transportation authority from the Public Utilities Commission of the state of South Dakota and from the Interstate Commerce Commission. It has passed the audits conducted by the ICC and the state of South Dakota. Its owners are knowledgeable in the business of transporting mobile homes and are active in that aspect of transportation service. In addition, the Administrative Law Judge believes that the equipment of the Petitioner is adequate and properly maintained. The vehicles are subject to regular maintenance and as of July 1, 1991, all of the trucks have passed through ICC maintenance federal inspections and are subject to Minnesota Department of Transportation truck safety inspections.

The Protestant asserts that the Petitioner is not fit and able to conduct the proposed operations because (1) there is no evidence that Broadacre carries coverage against public liability in the amounts required by Minn. Rule VXES WKH 3HWLWLRQHU LV a South Dakota corporation not qualified to do business in Minnesota as required by Minn. Stat. 303.03; (3) that the Petitioner has been cited by the Minnesota Department of Transportation Safety and Compliance Division for technical violations of Minnesota rules including failing to have a log book in possession, hauling mobile homes for Homera and Highland without having proper Minnesota permit authority; and other technical violations which have been outlined in the Findings of this report. (See Findings 12 through 14). The Protestant argues that the fitness and ability requirement implies a willingness to comply with applicable rules and regulations and that Broadacre's failure to comply with all of the Minnesota Rules demonstrates a lack of fitness.

The Petitioner has insurance in full force and effect with the Empire Fire and Marine Insurance Company on all of the toters owned and used by the Petitioner in its mobile home transportation business. Attached with the petition was a cover sheet showing the insurance provided. The Petitioner did not offer into evidence the actual insurance document that would establish the requisite coverage required by Minn. Rule 8855.0450. Although the issuance of a petition is contingent upon compliance of the laws and the rules relating to it, the Board generally allows the Petitioner a period of 45 days after the grant of the petition to have its insurance company file the appropriate certificate of insurance with the Minnesota Department of Transportation. (See e.g.: In the Matter of the Petition of Broadacre Mobile Home Transport, Docket No. CC53469/A-90-300, May 1, 1991). Submission of proof of liability insurance coverage is not an element that must be affirmatively proved at the contested case hearing itself. Minn. Stat. 221.121 provides in part as follows:

. . . the Board, after notice to interested persons and the hearing, shall issue the permit upon compliance with the laws and rules relating to it, if it finds that the petitioner is fit and able to conduct the proposed

operations, that the petitioner's vehicles meet the safety standards established by the department that the area to be served has a need for the transportation services requested in the petition, and the existing permit and certificated carriers in the area to be served have failed to demonstrate that they offer sufficient transportation services to meet fully and adequately those needs . . . (Emphasis added).

Furthermore, the definition of fit and able as defined earlier, references financial ability, adequacy of equipment and maintenance, competence, experience and mental and physical ability to comply with rules and statutes of the Commission. Failure to submit actual proof of adequate liability insurance during the contested case hearing does not indicate a lack of fitness or ability. As long as the Petitioner can provide the appropriate certificate of insurance to the Department as required by the Board, it has complied with the applicable statute and rules.

Similarly, with respect to the allegation that the Petitioner, a South Dakota Corporation, does not have a certificate of authority to transact business in Minnesota, this again is not an element which the Petitioner must affirmatively prove pursuant to Minn. Stat. 221.121 as long as the Petitioner satisfies the legal requirement prior to the Board's grant of the petition. Failure to submit such proof of authority to transact business in Minnesota at the contested case hearing does not evidence a lack of fitness or ability.

However, Protestant's allegations that the Petitioner's vehicles might be unsafe or that the Petitioner routinely engages in illegal traffic activities does go directly with the issue of fitness and ability. As the Findings of this report reflect, Broadacre transported approximately seven Minnesota intrastate shipments without first having appropriate permit authority to do so. Although the company was aware that it was necessary to have authority to haul private or irregular routes, it did not believe that it needed special authority to haul on a contract basis for specific mobile home manufacturers. In fact, the Petitioner obtained Minnesota Department of Transportation overweight/over-dimension permits for the movements in question. (Hearing Exs. 3, 4 and 5). After being informed to cease all Minnesota intrastate operations in violation of Minnesota statute, the Petitioner complied with those instructions and shortly thereafter filed the instant petition. The evidence in the hearing record indicates that the Petitioner was not specifically notified to cease all Minnesota intrastate operations until September 10, 1990. (Hearing Ex. 2g page 1). Following that notification, there is no evidence of any subsequent illegal Minnesota intrastate movements.

In a number of cases, the Public Utilities Commission and the Transportation Regulation Board have determined that a carrier may be found unfit where there is flagrant, persistent illegal activity which evidences a

character of mind in which a carrier is unlikely to comply in the future,
with
the transportation rules and regulations of the state. In the Matter of
the
Petition of Twin Cities International Courier. Inc., CSC 5-338/A-83-354,
Order
No. 5, March 12, 1984; In the Matter-of the Joint Petition of Howard Taylor.
d/b/a Taylor Transfer and Metropolitan Contract Services. Inc. to
Transfer
Local Cartage_Authority, LCC 713, 827/T-84-304, Order, May 30, 1985; and
other
cases cited In the Matter of the Petition of Wren Inc d/b/a Lakeville Moter
Express, RRCC 50/E-88-131, Order No. 18, March 10, 1989.

The Commission and the Board have generally avoided basing fitness decisions on past activities and have, instead, focused on the future.

In hip

Ulm Freight lines Inc., IRCC 649/A-75-24, T-30 (1979), the Public Utilities

Commission stated:

. . . [T]he object of determining fitness is not to punish the carrier for past unlawful operations . . . it is to determine the applicant's willingness and ability to conduct future operations in conformity with the statutes and applicable rules and regulations of the commission

In Robert Taylor d/b/a Taylor Transfer and Metropolitan Services LCC 713-827/T-84-304 (May 30, 1985), the Board reected an administrative law judges recommendation that a petition be denied because the petitioner had

knowingly engaged in activities that were unauthorized and had attempted to use a subterfuge. The Board determined that the appropriate test was whether or not the previous violations evinced a continuing and willful disregard to the law. Evaluating the evidence, it concluded that there was nothing to suggest that the petitioner would not abide by a definitive legal interpretation concerning the application. See, Petition of Fairway Transit Inc., CC 33363/A-87-464; OAH Docket No. 6-3001-2073-2 (July 8, 1989).

Minnesota courts have used the same standard for determining fitness in cases involving past illegal conduct. Brinks- Inc. y Minnesota Public Uliljties, Commission, 355 N.W.2d 446 (Minn. Ct. App. 1984). In Brinks, the court affirmed the Commission's finding of fitness and ability, noting that the Commission had said "that it will generally deny applications for CSC or IRCC authority after an applicant has been involved in unauthorized operations only when the previous violations evinced a continuing and willful disregard for the law." (355 N.W.2d at 45).

The conduct by the Petitioner herein is troubling, since the first citations issued for illegal operations were issued on July 27, 1990 and August 2, 1990. Following those two dates, Hearing Exhibits 4 and 5 evidence two additional movements between the dates of August 15 and August 19 for Highland Manufacturing. However, in the Petitioner's mind, there was uncertainty concerning the legality of Minnesota intrastate shipments when the Petitioner had written contracts with the manufacturers. It was not until September 10, 1990 when the Petitioner received the Department's Vehicle Inspection Report advising the Petitioner to cease all operations in violation

of Minnesota statute that the Petitioner could be accorded certain knowledge of its illegal operations. Accordingly, it has been concluded that Petitioner's conduct has not evinced a continuing and willful disregard for the law. It is likely that the Petitioner will abide by the Board's determination in this matter, and will conform its operations to Minnesota trucking rules and regulations in the future.

Similarly, with respect to the Petitioner's vehicles, the evidence in the record indicates that the vehicles although subject to some past equipment problems are now in excellent running condition. As of July 1, 1990 all of the trucks have passed new ICC maintenance inspection requirements. Again, the object of determining fitness is not to punish the carrier for past

activity, but to determine whether or not the Petitioner evidences the willingness and ability to conduct future operations in conformity with statutes and applicable rules and regulations.

Need for the Proposed Service

Petitioner Broadacre has the burden of establishing the existence of a need for the proposed transportation services. Protestant Barrett has the burden of showing that existing carriers adequately and fully meet the need of the shipper. Appeal of Signal Delivery Services, Inc., 288 N.W.2d 707, 712 (1980); American Courier Corp. v. Loomis Armored Car, Inc., 294 Minn. 207, 200 N.W.2d 175 (1972).

Although Broadacre has applied for contract carrier to haul for Homera and Centennial Homes, there is no evidence in the record which supports a showing of need for such transportation services. The Petitioner did not offer any testimony by the shippers in support of the petition. The only evidence whatsoever in the hearing record is contained in the petition. That evidence consists of the contracts for trucking service and the general "Statement of Specialized Service Offered." This evidence is insufficient to support a finding of need. Accordingly, Broadacre's petition for contract carrier permit authority to serve these two shippers must be denied.

With respect to Highland Manufacturing, the Petitioner has established transportation needs which were unsatisfied in 1990. Testimony by Highland indicates that on approximately 10 occasions during the busy season of 1990, Highland could not obtain timely transportation services from its primary carrier or its secondary carriers including the Protestant. It was during this period of time that Highland contacted the Petitioner and the Petitioner hauled mobile homes for Highland on an intrastate basis without proper permit authority. While the Administrative Law Judge recognizes that a Petitioner may not rely on evidence of illegal traffic movements to establish a public need for service, the testimony submitted by Highland clearly indicates that there was insufficient transportation services available during the busy season of 1990 from available permitted carriers within the state of Minnesota. See, Petition of Transportation Management, Inc., Chtr. 43616/E-87-129, sub. 5, Report of the Administrative Law Judge November 5, 1987, adopted without opinion; Petition of Wren, Inc. d/b/a Lakeville Motor

Express, supra at 28-29.

The court in Signal Delivery stated that "contract carriers should not be prevented from satisfying the changing transportation requirements of basic industries, especially where the distinct needs of the shipper may be better served by the new service than by existing carriers." However, in the instant case, Highland's needs are not so highly specialized that Petitioner is the only carrier available that could provide mobile home transportation service. Highland's need could be met by existing carriers if sufficient transportation services are available from them.

The witness on behalf of Protestant Barrett testified that a minimum of four and up to eight additional toters have been added to its fleet to serve the needs of Minnesota customers and that these additional toters would be made available to mobile home manufacturers which were the subject of this petition. The witness for Highland Manufacturing, Ron Totten agreed that if Barrett added four additional trucks, its current needs would be satisfied.

Thus, Barrett has met its burden of proving that it offers sufficient transportation services to fully and adequately meet the needs of this manufacturer. On the basis of testimony from the Petitioner's own supporting shipper, Barrett has met its burden of proving that it offers sufficient transportation services to fully and adequately meet the needs of the manufacturer. The Administrative Law Judge must conclude, therefore, that the petition for contract carrier contract authority must be denied.

P.A.